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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re VINCENTE G., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENTE G. (a minor),

Defendant and Appellant.

D055512

(Super. Ct. No. J221296)

APPEAL from an order of the Superior Court of San Diego County, Amalia L.

Meza, Judge. Affirmed.

The juvenile court adjudged Vincente a ward of the court under section 602 of the Welfare and Institutions Code after finding he possessed marijuana for sale under section 11359 of the Health and Safety Code. The court placed Vincente on probation pending a drug court screening hearing.

The only issue on appeal is whether Vincente was in custody when he was interrogated by the police. Vincente contends the trial court should have suppressed the statement he made before he received *Miranda*<sup>1</sup> warnings because he was in custody at the time of questioning. We affirm the order.

## FACTS

On May 28, 2009, uniformed San Diego Police Officers Adam Sharki and Oscar Armenta were patrolling the Skyline Lomita Park area in a marked police car. The officers observed two minors, one of whom was later identified as Vincente, laughing as they walked past the parked patrol car. The officers finished their unrelated business and drove toward Vincente and his companion.

Sharki asked Vincente and his companion how they were doing and became suspicious because Vincente appeared to be nervous or flustered. When the officers got out of their patrol car they saw a small box on the ground next to Vincente's feet that was not there when they initially arrived. Officer Sharki opened the box and found three individually wrapped bags of marijuana, three empty plastic bags and a scale. It was later determined that the street value of the confiscated marijuana ranged between \$80 and \$200.

Armenta questioned Vincente on the passenger side of the patrol car while Officer Sharki questioned Vincente's companion on the driver side to determine who the box belonged to. Sharki overheard Vincente say that the box was his. At no point during

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<sup>1</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

questioning did the officers give Vincente *Miranda* warnings. Sharki testified that he was uncertain whether Vincente and his companion were handcuffed during this exchange.

## DISCUSSION

The police must give suspects *Miranda* warnings before any "custodial interrogation" to protect the privilege against self-incrimination. (*Miranda, supra*, 384 U.S. at p. 444.) Interrogation becomes "custodial" when "a person has been taken into custody . . . or deprived of his freedom of action in any significant way." (*Ibid.*) The question is whether the suspect was formally arrested or subjected to any similar restraints on his or her freedom. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.)

Determining a suspect was subjected to "custodial interrogation" is a mixed question of law and fact. (*People v. Ochoa, supra*, 19 Cal.4th at p. 402.) We apply the deferential substantial evidence standard to the trial court's findings of fact and independently review the record to determine whether a reasonable person, under the circumstances, would believe he or she was free to stop the questioning and leave. (*Ibid.*)

To determine whether a suspect acted reasonably, we consider objective indicia of custody, including: "(1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning." (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.)

Other indicia of custody may also include if the suspect did not agree to the interview or if the police gave no option to terminate the questioning; if the police

informed the person he or she was a potential suspect; if there was any restriction on the suspect's freedom of movement; and if the police dominated or controlled questioning, pressured the suspect, or arrested him or her after questioning. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) In this analysis no one factor will control; instead, the "totality of the circumstances" must be examined. (*People v. Forster, supra*, 29 Cal.App.4th at p. 1754.)

Here, substantial evidence supports the trial court's finding Vincente was not in custody and thus, *Miranda* did not apply. Vincente was not formally arrested before questioning or otherwise physically restrained from leaving. The police did not detain him for a prolonged period during the initial investigatory questioning phase. The entire incident took place in the daylight hours in a public park and there is nothing in the record indicating misconduct or pressure on the part of the investigating officers. The officers merely detained Vincente and his companion briefly to figure out who owned the marijuana and scale. The fact that Vincente was presented with evidence of wrongdoing, and ultimately arrested as a result of his encounter with the police, does not change the analysis.

Custody does not turn on the officer's subjective belief about the possible guilt of the person being questioned, but rather on the objective reality of the circumstances. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442, fn. 35.) The officers here did not treat Vincente inappropriately, exert any physical or psychological pressure on him, or question him in a police-dominated atmosphere. In fact, the officers casually approached Vincente and his companion only because their behavior aroused their suspicion. A

reasonable person under these circumstances would not believe his or her freedom of movement was restrained in any significant way. Because no *Miranda* violation occurred, the court was not required to suppress Vincente's statement to the police.

#### DISPOSITION

The order is affirmed.

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HUFFMAN, Acting P. J.

I CONCUR:

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O'ROURKE, J.

McINTYRE, J.:

I dissent from the majority's conclusion that Vincente was not in custody for purposes of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). A reasonable person in his circumstances would not have believed he was free to stop the questioning and leave. (*People v. Ochoa* (1998) 19 Cal.4th 353, 402.)

After the police initiated contact with Vincente, he did not immediately volunteer any information; rather, he admitted the box was his only after police began questioning him. (See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162 (*Aguilera*).) The police did not tell Vincente he could leave and implicitly affirmed that he could not do so when they separated Vincente from his companion. Separating a suspect from "friends . . . lending moral support," is one of the "psychologically" oriented interrogation techniques *Miranda* cited (*Miranda, supra*, 384 U.S. at pp. 449-450) as "undermin[ing] the individual's will to resist" questioning. (*Id.* at p. 467.) Indeed, undermining Vincente's will was likely an easy task given the fact that he was "nervous" and "flustered" when the police arrived.

It is not determinative here, as it has not been in other cases, that the police questioned Vincente in a public place. (See *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404-1405.) Neither is it dispositive that police did not detain him for a prolonged period during questioning. Long-term questioning was not necessary in light of the incriminating evidence the police found and presented to the nervous Vincente. Further, because a reasonable person in his circumstances would not have thought he could leave,

it is also not determinative that Vincente may not have been handcuffed during questioning.

This case is distinguishable from *Berkemer v. McCarty* (1984) 468 U.S. 420 (*Berkemer*). Unlike the traffic stop involved in that case, being stopped on a sidewalk and separated from your companion for questioning is neither a routine nor "presumptively temporary" occurrence, but is inherently more intimidating. (*Id.* at pp. 437-439.) Further, unlike *Berkemer*, the officers here presented Vincente with incriminating evidence. This indicated that he was a suspect and made the subsequent questioning more "accusatory," placing upon Vincente pressure to confess not present in *Berkemer*. (*Aguilera, supra*, 51 Cal.App.4th at pp. 1162, 1164.) A reasonable suspect in his position would have ascertained that the questioning officer believed he was guilty. Although, as the majority correctly notes, the officer's belief, by itself, is irrelevant, a suspect's knowledge of that belief *is* relevant. It suggests that his detention will "not be temporary," (*Berkemer, supra*, at p. 442) but that "questioning will continue until he provides his interrogators the answers they seek." (*Id.* at p. 438.) Because such psychological pressure during questioning is the type from which *Miranda* sought to protect suspects, I would suppress the statement and reverse the order.

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McINTYRE, J.